Supreme Court, U.S.
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No. 99-220

In The

Supreme Court of the United States

DCR, INC. and KATHY T. JOHNSON,

Petitioners,

v.

PIERCE COUNTY,

Respondent.

On Petition For A Writ Of Certiorari To The Washington Court Of Appeals, Division II

PETITIONERS' REPLY BRIEF

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REPLY TO ARGUMENT ON JURISDICTION

Both in the trial court and on appeal, Petitioners alleged that the challenged provisions of the Pierce County Ordinance violated the free speech clauses of both the federal and state constitutions. The Washington Court of Appeals acknowledged this in the introductory portion of its written decision, stating:

> On appeal, DCR and Johnson claim the trial court erred in summarily dismissing their case, because there are genuine issues of material fact concerning the constitutionality of Pierce County Ordinance 94-5, *involving the First, Fifth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 3 and 5, of the Washington Constitution.*

See, Petition at App. 6 (emphasis supplied).

Moreover, the Court of Appeals specifically rested its decision on both federal and state constitutional grounds. In addressing the question of whether the so-called ten-foot rule had an impact on expression, the Court of Appeals stated:

> We therefor hold that proximity is not an expressive component of erotic dance entitled to protection *under either the First Amendment or the State Constitution.*

See, Petition at App. 13 (emphasis supplied).

In spite of Respondent's unfounded claim to the contrary, Petitioners have unmistakably complied with the jurisdictional requirement of Supreme Court Rule 14(g)(1).

REPLY TO RESPONDENT'S STATEMENT OF THE CASE

While there was undoubtedly testimony in the legislative record reflecting in part the parade of horribles referred to by Respondent in its statement of the case, it was equally clear from the evidence presented to the trial court, that much of the material inserted in the record before the County Council was either greatly exaggerated or false. Thus, Lieutenant Larry Gibbs, who commanded the unit responsible for enforcing the prior adult entertainment ordinance, testified in his deposition that there was minimal evidence of drug deals and prostitution.[1] In addition, the procedural history of the case belies Respondent's claim that the adult nightclubs in Pierce County, Washington, are the second coming of Sodom and Gomorrah. At the time that the complaint was filed in the trial court in April, 1994, Respondent stipulated to the entry of a preliminary injunction preventing the County from enforcing the challenged ordinance pending the outcome of the litigation. The case then languished in the trial court for nearly two years before Respondent filed its summary judgment motion in January, 1996. The point here is simply that if the adult nightclubs in Pierce County, Washington represented the grave threat to public health and safety that Respondent's statement of the case now seems to suggest, Respondent would never

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[1] In his deposition, Lieutenant Gibbs was asked how the challenged ordinance would prevent anyone from making payoffs to the public officials, and he candidly replied, "How would it prevent someone from making – give me a break. I mean anyone can attempt to make a payment to an officer, you know, they have no control over that". Gibbs Deposition at 58.

have agreed to the entry of a preliminary injunction and would never have allowed the case to sit on the "back burner" for so many months before seeking disposition of the matter.

Assuming for the sake of argument however that the Pierce County adult nightclubs are a hot bed of organized crime, bribery of public officials, drug deals, and prostitution, Respondent fails to explain what this has to do with the ban on table dancing. On its face, the Ordinance apparently is not designed to put the clubs out of business nor does it prevent the dancers from sitting with patrons, and discussing whatever subject they may choose to discuss, including, for example, drug dealing or prostitution. In this case, the Ordinance targets a particular form of expression without any suggestion by Respondent that the restriction imposed by the regulation will alleviate the problems Respondent refers to in its statement of the case. Several lower courts have held that there must be at least some rational connection between the factual justification in the legislative record and the particular restriction imposed. *See*, for example, *Tollis, Inc. v. San Bernardino County*, 827 F.2d 1329 (9th Cir. 1987); *N.W. Enterprises, Inc. v. City of Houston*, 27 F.Supp.2d 754 (S.D. Tex. 1997); *World Wide Video, Inc. v. City of Tukwila*, 117 Wn.2d 382, 816 P.2d 18 (1991). At least with respect to the more scandalous claims set forth in Respondent's statement of the case, there is no such connection.

REPLY TO RESPONDENT'S CLAIM THAT THE ISSUE OF FIRST AMENDMENT PROTECTION FOR EROTIC DANCING HAS BEEN REPEATEDLY DECIDED

A primary question unresolved by this Court's decision in *Barnes v. Glen Theatre, Inc.*, 475 U.S. 41 (1991), is how to decide which components of erotic expression are entitled to First Amendment protection. The plurality in *Barnes* assumed that nudity per se was not a critical part of the dancer's erotic expression such that the regulation's ban on total nudity was not judged by the same maximum level of scrutiny that this Court typically reserves for content-based restrictions.[2] This Court has yet to decide whether governmental restrictions on other components of the dancer's erotic expression, such as proximity to the patron, are to be judged by the same deferential standard found to be appropriate in *Barnes*. The Court of Appeals in this case and the Ninth Circuit in *Colacurcio v. Kent*, 163 F.3d 545 (9th Cir. 1998), *petition for cert. filed*, 67 U.S.L.W. 3008 (June 23, 1999) (No. 98-205), held without specific direction from this Court that restrictions on proximity should be measured against the lowest level of scrutiny, assuming that First Amendment protection was applicable at all.

Petitioners respectfully submit that approach taken by the lower courts amounts to unprincipled, piecemeal

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[2] Typically, content-based regulations are subject to the most exacting scrutiny. *Boos v. Barry*, 485 U.S. 312, 321 (1988). They must serve a "compelling governmental interest", and they must constitute the "least restrictive means to further the articulated interest". *Id.* and *see*, also *Sable Communications v. FCC*, 492 U.S. 115, 126, 106 L.Ed.2d 93, 109 S.Ct. 2829 (1989).

adjudication of free speech claims, which inevitably leads to the general erosion of First Amendment safeguards. This situation has arisen in part because this Court has yet to articulate a standard for deciding whether a particular component of erotic dance is central or peripheral to the core of protected expression, and it has yet to say whether a complete ban on an essential part of that expression should be judged by either a strict or deferential standard. Petitioners are seeking certiorari in order to have these important questions resolved.

REPLY TO ARGUMENT THAT PETITIONERS ARE SEEKING SPECIAL FIRST AMENDMENT PROTECTION

It is fundamentally wrong to characterize Petitioners' claim as one seeking "special" First Amendment protection. More accurately, Petitioners maintain that table dancing is entitled to the First Amendment protection. While the Ninth Circuit in *Colacurcio v. Kent* may have skirted the issue by characterizing the claim as one which sought special First Amendment protection for table dancing, the Washington Court of Appeals was much more forthright and candid in holding that table dancing is not entitled to any First Amendment protection at all.[3] In reality, the question is whether a court is entitled to completely deprive a particular form of expression of constitutional protection, because the expression is

[3] The Court of Appeals stated, "Having found that proximity is not constitutionally protected expression, aside from the performance of the dance itself, we need not address DCR's prior restraint argument." *See*, Petition at App. 13.

believed [by the court] to be associated with so-called secondary effects, and because the expression, in the court's estimation, is devoid of social value. This is the net effect of the Court of Appeals' holding in this case and the holding of the Ninth Circuit in *Colacurcio*.

The secondary effects doctrine as articulated in *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 91 (1986) was developed as a means by which a court could determine whether a regulation applicable on it face to a particular form of expression, was content-neutral or content-based. This in turn would determine whether a court was to apply strict scrutiny or time, place and manner analysis. However, the Washington Court of Appeals in this case, and the Ninth Circuit in *Colacurcio*, have taken the doctrine a step further by saying that if a certain form of expression happens to be associated with secondary effects, then that ends the inquiry, and the expression is unprotected. In essence, the Washington Court of Appeals and the Ninth Circuit have carved out a bold new exception to the First Amendment in order to evade the obvious problem that the ten foot rule is a complete ban on a particular form of expression and therefor application of time, place and manner analysis does not save the regulation.[4] The novel question for this Court is whether the carving out of this new exception is proper, given that it is ultimately based on the lower court's

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[4] This Court has repeatedly held that a regulation which completely forecloses an entire medium of expression does not pass muster under the time, place and manner test. *City of Ladue v. Gilleo*, 512 U.S. 43 (1994); *Lovell v. City of Griffin*, 303 U.S. 444 (1938); *Jamison v. Texas*, 318 U.S. 413 (1943); *Schad v. Mt. Ephraim*, 452 U.S. 61 (1981).

subjective, ad hoc determination that a particular form of expression is so lacking in social value that it should not be protected.

REPLY TO ARGUMENT THAT PETITIONERS HAVE NOT BEEN DENIED ACCESS TO THE NUDE DANCING MARKET

Petitioners are seeking certiorari because the Ninth Circuit's "market entry" test is devoid of meaning and because this Court has yet to say whether and under what circumstances economic impact evidence is relevant in resolving a First Amendment claim. The Ninth Circuit implied in *Colacurcio v. Kent* that if the petitioners presented evidence to the trial court sufficient to show that the "ten foot rule" would put them out of business under any possible business format, then they might have prevailed. 163 F.3d at 557-558. However, there is no controlling case law which tells litigants with certainty that this is the burden which they must sustain, and the Washington Court of Appeals held to the contrary in stating that adverse economic impact is completely irrelevant so long as the regulation does not amount to an outright ban.[5] This Court should grant certiorari to provide a clear and

[5] The Court of Appeals stated, "Where government actions have not overtly denied adult businesses the ability to open and operate, but have merely made it more difficult to earn a profit, there has been no governmental elimination of alternative avenues of communication, and no denial of the First Amendment right of free speech or expression." *See*, Petition at App. 25.

controlling answer to a question concerning which the lower courts have failed to provide guidance and standards.

REPLY TO ARGUMENT THAT THE SECTIONS OF THE PIERCE COUNTY CODE WHICH GOVERN LICENSING DO NOT CONSTITUTE AN IMPERMISSIBLE PRIOR RESTRAINT

Contrary to Respondent's suggestion at page 14 of its Brief In Opposition, Petitioners are not arguing that erotic dance studio licenses must be issued in thirty days, regardless of uncorrected code violations. Petitioners are arguing that this Court's decision in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990) requires the licensor to issue *or deny* the license within a reasonable period of time. In contrast to what is mandated by *FW/PBS*, Pierce County Code (hereafter PCC) § 5.14.070 obligates the auditor to do neither if it is determined, in his or her discretion, that the violation is not "readily ascertainable". According to *FW/PBS*, if an applicant fails to insure that it has complied with other applicable codes before seeking to obtain an erotic dance studio license, it should bear the risk of denial, but not of infinite delay.[6]

[6] In Pierce County, one must obtain a building permit and certificate of occupancy in the event of structural modifications. This insures compliance with zoning building and fire codes. However, like the Dallas Ordinance that was considered in *FW/PBS*, the Pierce County Ordinance 94-5 requires reinspection regardless of whether the applicant previously has obtained a certificate of occupancy.

In the event of license denial, an unsuccessful applicant may file an appeal to the hearing examiner, and obtain an administrative hearing within ninety days. *See*, PCC § 5.14.240(A). The Hearing Examiner is required to render a decision within ten days of the hearing. *See*, Respondent's Opposition Brief at App. 1. Thereafter, if the applicant is unsuccessful in reversing the auditor's decision, it may seek judicial review by means of a statutory writ. However, the writ statute fails to provide for a prompt judicial hearing. The potential delay of one hundred days before the hearing examiner is required to make a decision, coupled with the absence of a requirement of a prompt judicial hearing, means that that unsuccessful license applicant may remain in limbo for months and months, even if it is destined to prevail. This fails to satisfy the *FW/PBS* requirement of prompt judicial review.[7]

The stay provision in PCC § 5.14.240(B) merely stays the decision of the auditor, it does not permit the business to begin operations in the event of license denial, or to remain open in the event of non-renewal.[8] Under these circumstances, the status quo is that business is closed, pending the outcome of administrative and judicial

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[7] To the extent that the opinion of the Washington Supreme Court in *World Wide Video v. Tukwila*, 117 Wn.2d 382, 816 P.2d 18 (1991) requires a different result, it is in direct conflict with this Court's decision in *FW/PBS*.

[8] PCC § 5.14.080 provides that the license expires automatically on December 31 and there is nothing in the ordinance which permits the business to remain open pending the decision of the auditor on the renewal application, or pending exhaustion of administrative and judicial appeals.

review. This is contrary to the rule against prior restraints as set forth in *Freedman v. Maryland*, 380 U.S. 51 (1965), and *FW/PBS*. The Brief In Opposition glosses over these fundamental problems, and argues contrary to established precedent that the First Amendment sanctions these uncontrolled procedure delays.

CONCLUSION

This Court should issue the writ of certiorari to the Washington Court of Appeals.

Respectfully submitted,

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